

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

SUNBOW ENTERTAINMENT, LOC <sup>1/</sup>

Employer

and

Case No. 31-RC-7746

MOTION PICTURE SCREEN CARTOONISTS  
AND AFFILIATED OPTICAL ELECTRONIC  
AND GRAPHIC ARTS, LOCAL 839, I.A.T.S.E.

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding , the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. <sup>2/</sup>
3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. <sup>3/</sup>

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: <sup>4/</sup>

**INCLUDED:** All full-time, regular part-time, and “freelance” employees who work on the production of animated cartoons for the Employer located at 1725 Victory Blvd., Glendale, CA (including the property designers, character designers, background designers, background painters, colorsty lists, clean-up artists, storyboard artists, sluggers, slugging directors, sheet timers/timing directors, and checkers.

**EXCLUDED:** Writers, overseas supervisors, production coordinators, production assistants, production accountants, production managers, supervising producer, voice director, receptionist, associate producer, art director, the color/precomputer positions, storyboard supervisors, office clericals, guards, and supervisors as defined in the Act.

#### **DIRECTION OF ELECTION <sup>5/</sup>**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their

replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Motion Picture Screen Cartoonists and Affiliated Optical Electronic and Graphic Arts, Local 839, I.A.T.S.E.**

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *National Labor Relations Board v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the **FULL** names and addresses of all the eligible voters shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the office of Region 31, Suite 700, 11150 West Olympic Boulevard, Los Angeles, California 90064-1824, on or before **August 2, 1999**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **August 9, 1999**.

**DATED** at Los Angeles, California this 26<sup>th</sup> day of July, 1999.

/s/ James J. McDermott

James J. McDermott, Regional Director  
National Labor Relations Board  
Region 31  
11150 West Olympic Blvd., Suite 700  
Los Angeles, CA 90064-1824

## **FOOTNOTES**

- 1/ The name of the Employer appears as corrected at the hearing.
- 2/ Sunbow Entertainment, LOC (hereinafter "Sunbow" or the "Employer"), is a New York corporation engaged in the production of animated television programs. The Employer's principal place of business is located in New York, New York, and it maintains a facility located at 1725 Victory Boulevard in Glendale, California. Within the past year, a representative period, the Employer has purchased goods and/or services valued in excess of \$50,000 directly from entities located outside of the State of California.
- 3/ A question concerning representation exists, as the record shows that the Petitioner requested recognition from the Employer and the Employer had declined to recognize it.
- 4/ Motion Picture Screen Cartoonists and Affiliated Optical Electronic and Graphic Arts, Local 839, I.A.T.S.E. (hereinafter "Local 839" or the "Petitioner"), seeks to represent a unit comprised of all full-time and regular part-time employees who work in the pre-production of animated cartoons at the Employer's Glendale facility. The parties agree that this unit should include the following positions: property designers ("prop designers"), character designers, background designers, background painters, color stylists, and clean-up artists. Petitioner seeks to exclude from the unit the following positions: writers, overseas supervisors, production coordinators, production assistants, production accountants, production managers, supervising producer, voice director, receptionist, associate producer, art director, the color/pre-computer positions, office clericals, guards and supervisors. The Employer did not object to these exclusions. Both parties agree that any employees who are Canadian citizens residing in Canada are to be excluded from the unit.

In addition to the employees included in the unit by stipulation of the parties, the Petitioner seeks to represent the storyboard artists, sluggers/slugging directors ("sluggers"), sheet timers/timing directors ("sheet timers"), checkers, storyboard supervisors, and directors. Of these job classifications, the Employer seeks to exclude the directors and storyboard supervisors on the bases that such persons are either statutory supervisors or managers. The Employer also seeks to exclude the storyboard artists, sluggers, sheet timers, and checkers on the bases that such persons are independent contractors or, alternatively, do not share a community of interest with the employees its agrees should be included in the unit.

### **FACTUAL BACKGROUND**

The Employer produces animated television series. Each series is typically composed of 26 thirty-minute episodes. Pre-production for such a 26 episode series lasts for a duration of 30 to 40 weeks. At the time of this hearing, the Employer was in the midst of pre-production on an animated series called "Fat Dog Mendoza" and was about to commence pre-production of another animated series called "Molly O!" Once pre-production is completed, materials are sent to Korea, where the actual animation takes place.

The persons who work in pre-production at the Employer's facility can be divided into two groups: permanent staff and in-house series staff. The permanent staff are employed for an indefinite period of time, while the in-house series staff are employed for the 30 to 40 weeks it takes to complete pre-production of the particular series. The permanent staff includes the positions of supervising producer, associate producer, production manager, art director, production accountant, and receptionist. The in-house series staff on each of the two series presently being produced include or will include the positions of director, art director, storyboard supervisor, property designer, character designer, background designer, background painter, color stylist, and clean-up artist.

The pre-production process which takes place at the facility is as follows. Once a script is received, the associate producer, production manager, and director meet, review the script, and determine what needs to be done for the episode. For example, they determine what characters need to be drawn by the character designer, what backgrounds need to be drawn by the background designer, what colors certain props will be, and then make assignments of work accordingly. After the series employees have received their assignments, they design the required characters, props, and backgrounds. To illustrate, the prop designer will create and draw models of a truck that will appear in the episode while the color stylist will color in the model truck.

Once the models are created, then "freelancers" prepare the product to be processed by the animators. The Employer uses the term "freelancer" to refer to persons who work outside of the facility (the record shows that many work from their homes), are not required to work set hours, and are paid a flat rate for each piece of work that they complete. The freelance positions are storyboard artist, slugger, sheet timer, and checker.

The associate producer or production manager mails materials to the freelancers. Once the freelancers have completed their work, they mail the materials back to the Employer. The freelancers communicate with the Employer via telephone or facsimile.

In terms of the work done by the freelancers, the first step is for the storyboard artists to design a storyboard. A storyboard is a series of drawings, somewhat like a page from a comic book, which visually establishes the progression of action and dialogue of the story. Every episode is typically divided into three acts, each of which is drawn by a different storyboard artist. Therefore, there are usually three storyboard artists designing three different storyboards for every episode. The Employer sends to the storyboard artists a package of materials to help them

visualize the script. The package includes the script, dialogue track, and models of characters, props, and backgrounds. The Employer also supplies the storyboard artists with storyboard paper that is marked with the Employer's logo. While the associate producer or production manager may inform the storyboard artists about deadlines for the submission of storyboards, the storyboard artists' primary communication with the Employer is through the storyboard supervisor. After receiving their assignments and materials, the storyboard artists have two weeks to design a rough draft of the storyboard and to submit it to the storyboard supervisor. If just minor revisions are required to make the storyboard usable, then the storyboard supervisor will make those changes himself. But if the storyboard requires major changes, the storyboard supervisor will send the storyboard back to the storyboard artist along with directions on what changes need to be made. The storyboard artist then has one week to make the changes and resubmit the storyboard to the storyboard supervisor.

The second step is to "slug" the storyboards. To "slug" is to calculate the number of frames of film each portion of the story will require. All three storyboards comprising one episode are sent, along with a line length script (a script that has the dialogue length next to it in frames) and a dialogue track, to a "slugger." The slugger calculates the number of frames of film required for each portion of the story and then writes his or her calculations on the storyboard. The associate producer or production manager gives the slugger a one-week deadline to complete the slugging. Once the slugger has slugged the entire episode, he or she mails the slugged storyboards along with the rest of the materials back to the associate producer. The associate producer then gives the slugged storyboard to the director.

The third step is for all of the materials to be sent to an outside agency called a track reader. The track reader produces "exposure sheets," which are sheets of



paper saying what action and dialogue will occur in each frame of film. (Both the Petitioner and the Employer agree that the track readers are to be excluded from the unit.)

The fourth step is for the script, dialogue track, slugged storyboards, and exposure sheets to be sent to sheet timers. There are usually three sheet timers working on each episode; one for each act of the episode. Based on the information contained in the slugged storyboards, the sheet timers calculate what action will occur in which frame of film and will indicate that on the exposure sheets.

The fifth step is for the script, dialogue track, storyboards, and exposure sheets to be sent to a "checker." The checker analyzes all of the materials to make sure that the animation will flow smoothly and consistently. In essence, the checker checks everyone else's work to ensure that a consistent product is sent to the animators. Each series has one checker.

Once the freelancers have completed their work, the materials are sent to Korea for the animators located there to do the actual animation.

## **LEGAL ISSUES AND DISCUSSION**

### **I. The Supervisory and Managerial Issue**

The Employer asserts that the two director positions and the two storyboard supervisor positions are supervisory positions within the meaning of §2(11) of the Act. The Petitioner disagrees and seeks to have them included in the unit. The burden falls on the Employer, as the party attempting to exclude individuals from voting for a collective-bargaining representative, to establish that these individuals are statutory supervisors. *Bennett Indus., Inc.*, 313 NLRB 1363 (1994); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Golden Fan Inn*, 281 NLRB 226, 229-230 fn. 24 (1986); *Tucson Gas & Elec. Co.*, 241 NLRB 181 (1979).

Section 2(11) of the Act defines a statutory supervisor as:

... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

These twelve indicia are to be read in the disjunctive, so that the exercise of any one of them may warrant a finding of supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), *enfd.* 794 F.2d 527 (9<sup>th</sup> Cir. 1986).

Section 2(11) also contains the "conjunctive requirement that the power be exercised with 'independent judgment,' rather than in a 'routine' or clerical' fashion." *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). The Board refrains from construing supervisory status too broadly, as the inevitable consequence of such a construction is to remove individuals from protection of the Act. *Quandrex Environmental Co., Inc.*, 308 NLRB 101, 102 (1992).

Alternatively, the Employer asserts that the directors and storyboard supervisors are managerial employees, and are to be excluded from the unit on that basis. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289, 85 LRRM 2945 (1974), the United States Supreme Court held that managerial employees were also excluded from the Act's protection. The Board defines managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp., Convair Aerospace Div.*, 213 NLRB 851, 857 (1974)(citing *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320 (1947)).

## **A. Directors**

There is one director on each animated series--one for "Fat Dog Mendoza" and one for "Molly O!" The director is in charge of every aspect of pre-production work. The director initially meets with the creator and writer of the series to determine what the series will be about and what it will look like. Throughout pre-production, the director is responsible for communicating that vision to the staff.

The director is at the top of the hierarchy of each series. Below him are the art director and the storyboard supervisor. (The Union has agreed with the Employer that the art director is a statutory supervisor.) The next level down are the series in-house employees: property designers, character designers, background designers, background painters, color stylists, and clean-up artists. The director is also in charge of the freelance positions: the storyboard artists, sluggers, sheet timers, and checkers.

The director is hired by the associate producer. His immediate supervisors are the associate producer and the supervising producer. The director also works closely with the production manager and associate producer to make sure the series is progressing on schedule.

The record reveals that the director possesses the authority to hire employees. For example, the director of Molly O! hired the series storyboard supervisor. After the director recommended the candidate for hire, the supervising producer and the associate producer interviewed the candidate. However, the final decision to hire the candidate was left to the director. In making this hiring decision, the director exercised independent judgment: the director knew the candidate's work and trusted his abilities.

The director participates in the group decisions to hire in-house series personnel. The director, along with the supervising producer, associate producer, production manager, and art director, evaluates the candidates. While the associate producer has the authority to veto any decision, she has not done so in deference to the committee's decisions.

The director also evaluates hiring recommendations made by others. To illustrate, if the art director wanted to recommend a particular storyboard supervisor for hire on the series, he would make that recommendation to the director and production manager. The director, along with the production manager, has the authority to veto that recommendation, although the record is silent as to any instances of such a rejection.

The director has some authority to promote employees. If an employee working on a series wanted to be promoted to a vacant higher position, the decision would be made by the director or supervising producer.

As to the assignment of duties, the director plays a central role. Upon receipt of the script, the director meets with the production manager and associate producer to decide what needs to be designed for that episode and then they parcel out the job assignments. For example, the director or the storyboard supervisor will determine what section of the script a storyboard artist will produce.

The director shares the authority to adjust grievances. The record shows that if an employee were having problems with a fellow employee, he could speak to the director, associate producer, or supervising producer.

Each director's terms and conditions of employment are as follows. The directors' salaries range between \$3,500 and \$3,600 per week. The director for "Molly O!" is retained under a contract. The director for "Fat Dog Mendoza" is not subject to an employment contract; the record is silent as to the reason why. At the time of

the hearing, each director had his own office at the facility. The reasons for this were because one director's office was too small to share, while the other director has his own office only temporarily until a storyboard supervisor is hired. Each director has health benefits provided by the Employer.

Based on the foregoing, I find that the directors are supervisors within the meaning of §2(11) of the Act, as they exercise indicia of supervisory status in regard to hiring, recommending for hire, promoting, and assigning employees, as well as adjusting grievances. Accordingly, the directors are to be excluded from the unit and are ineligible to vote.

As I have found the directors to be statutory supervisors, and therefore excluded from the unit, it is unnecessary to discuss the issue of their alleged managerial status.

#### **B. Storyboard Supervisors**

Each of the Employer's two series will ultimately have one storyboard supervisor. At the time of the hearing, the storyboard supervisor for "Molly O!" had not yet been hired, as the series was in the very early stages of pre-production. Therefore there was only one storyboard supervisor at the time of the hearing. Accordingly, I will determine herein only the status of the existing storyboard supervisor.

The storyboard supervisor is responsible for overseeing the creation and design of all of the storyboards. His role is to communicate to the storyboard artists the cinematic vision of the producers and to review the artists' storyboards to make sure they effectively and accurately represent that vision. The storyboard supervisor also works closely with the character, prop, and background designers. The storyboard supervisor is hired by the associate producer and the supervising producer. While his services are not retained through an employment contract, the

producers hope that he will stay with the Employer during the entire duration of pre-production. His immediate supervisor is the series director.

In terms of hiring authority, the record shows that the storyboard supervisor has the authority to recommend storyboard artists for hire and that his recommendation is regularly approved by the producers. Because the design of effective storyboards is the responsibility of the storyboard supervisor, the producers allow the storyboard supervisor to assemble a crew of storyboard artists whose skills he believes are best suited for the series. This involves recommending for hire storyboard artists with whom he is familiar and recommending new storyboard artists whose portfolios he has reviewed. If the storyboard supervisor strongly believes that a particular candidate should be hired, the producers will defer to his judgment. There are approximately nine storyboard artists working at any given time on a series.

The storyboard supervisor supervises the work of the storyboard artists. The storyboard supervisor is the main line of communication between the Employer and the storyboard artists and has authority to responsibly direct the work of the storyboard artists. When the storyboard supervisor first assigns a storyboard to a storyboard artist, he speaks to the storyboard artist to communicate the series' artistic vision. The storyboard artists are required to submit rough drafts of their storyboards to the storyboard supervisor two weeks after receiving their assignment. The storyboard supervisor then reviews the storyboards to decide whether they are consistent with the script and models of the characters, backgrounds, and props. If the storyboard supervisor is unsatisfied with the work performed by the storyboard artist, he will send the storyboard back and have the storyboard artist make the needed revisions.

If just minor revisions are required for the storyboards, the storyboard supervisor will make those revisions himself. The record shows that the storyboard

supervisor spends approximately twenty to thirty percent of his time making revisions in storyboards. Accordingly, the storyboard supervisor needs the artistic skills to draw storyboards. The storyboard supervisor on "Fat Dog Mendoza" has worked for the Employer as a storyboard artist on previous productions and has twice done storyboards himself on "Fat Dog Mendoza" when he has wanted to. When he has done storyboards, the storyboard supervisor received the same flat rate that all other storyboard artists receive.

As to the assignment of work, either the storyboard supervisor or the director decide which storyboard artists will draw which portions of the script.

The storyboard supervisor is paid a salary ranging between \$2,000 and \$2,500 per week. The storyboard supervisor shares an office with the art director. He receives health benefits from the Employer.

Based on the foregoing, I find that the storyboard supervisor is a supervisor within the meaning of §2(11) of the Act, as he exercises indicia of supervisory status in regard to recommending the hire of storyboard artists and responsibly directing the work of the storyboard artists. Accordingly, the storyboard supervisor is excluded from the unit and is ineligible to vote.

As I have found the storyboard supervisor to be a statutory supervisor, and therefore excluded from the unit, it is unnecessary to discuss the issue of his alleged managerial status.

## **II. The Independent Contractor Issue**

The Employer asserts that the persons classified as "freelancers" are not employees of the Employer, but rather are independent contractors. On that basis, the Employer contends, the freelancers should be excluded from the unit. The

freelance positions which Petitioner contends should be included in the unit are storyboard artist, slugger, sheet timer, and checker.

Section 2(3) of the Act excludes independent contractors from the definition of employee. In *Roadway Package System, Inc.*, 326 NLRB No. 72 (August 27, 1998), the Board re-evaluated the criteria it utilizes to determine independent contractor status. The Board concluded that, in determining whether certain individuals were independent contractors or employees, it would employ the criteria enunciated in the Restatement (Second) of Agency.

The Restatement provides for a ten-factor analysis that considers multiple aspects of the employment relationship: (1) the extent of control regarding the details of work; (2) the distinct nature of the occupation or business; (3) whether the work is usually done with or without supervision; (4) the skill required to perform the work; (5) who supplies the tools and the place of work; (6) the length of employment; (7) the method of payment (i.e., by time or job); whether the work is part of the employer's regular business; (9) whether the parties believe they are in a master/servant relationship; and (10) whether the principal is or is not in the business. See Restatement Second of Agency §220(2)(a)-(j).

The record in this case provides evidence supporting a finding of independent contractor status as follows. First, all of the freelancers perform their work outside of the Employer's facility. The Employer generally mails all of the materials needed to perform the work to the freelancers. Once the freelancers have completed their assignments, they mail the materials back to the Employer. While the record indicates that some of the freelancers who live in the Los Angeles area sometimes drop by the facility to pick up or drop off items, such visits are not mandated by the Employer. Additionally, many of the freelancers do not live in California. The record shows that two of the storyboard artists live in Canada, one lives in Florida, and one lives in Wisconsin.



Second, many of the freelancers have full-time staff positions working elsewhere. The record revealed that many of the freelancers have full-time positions at other studios, such as Disney and Nickelodeon, and do their freelance work for the Employer during their off-duty time. Third, unlike the Employer's in-house series personnel who are paid a weekly salary, the freelancers are paid by the project. Fourth, unlike the in-house series personnel, the freelancers do not receive health benefits. Fifth, except for the storyboard paper which is provided to the storyboard artists, the freelancers provide their own equipment and materials required to perform their duties. Sixth, unlike the in-house series personnel, who work Monday through Friday from 9:00 a.m. to 6:00 p.m., the freelancers do not have any set work schedule; they merely have to submit their work by the assigned due date. Seventh, the record shows that, after the initial discussion between storyboard supervisor and storyboard artist, the storyboard supervisor provides little guidance to the storyboard artists prior to the submission of the rough drafts of their storyboards. Eighth, some of the freelancers do not work on every episode. In regard to the storyboard artists, the work is performed in a cycle so that they typically work on one out of every three episodes.

Supporting a finding that the freelancers are employees is the following evidence. First, the Employer exercises significant control over the details of the work. The work product of the storyboard artists, for example, is closely controlled. The storyboard artist's role is not so much to create art as it is to communicate the plot and action of the script by way of the storyboards to the animators in Korea. The purpose of the storyboard is to provide the animators with a visual guide to the script. In designing their storyboards, the storyboard artists do not create characters, props, or backgrounds--that is done by the in-house series personnel. The storyboard artists draw their storyboards based on models of characters, props, and backgrounds provided to them by the Employer. These models can be quite detailed: for a recurring character, the storyboard artists would be provided

with a model showing the character from the front, from a three-quarter position, from a three-quarter rear position, and from a rear view position. The storyboard artists would also be provided with models of the character's facial expressions (showing happiness, sadness, etc.) as well as mouth positions for dialogue. In addition to the models, the script also instructs the storyboard artists as to what needs to be done. Most importantly, if the storyboard supervisor is unsatisfied with the storyboard submitted by the storyboard artists, he will ship it back to them along with instructions on what needs to be corrected. Accordingly, it is evident that the Employer exercises significant control over the work of the storyboard artists. In regard to the work done by the sheet timers, the director reviews the exposure sheets submitted by the sheet timers to make sure that they were done properly. Finally, the Employer exercises control over the work of the sluggers and sheet timers in that the Employer has the checker review their work.

Second, the record shows that in the animation industry, it is common for storyboard artists, sluggers, sheet timers, and checkers to work on a freelance basis and out of their homes. Even individuals in those positions who are employed full-time at a studio sometimes perform their duties for the studios from their homes. Third, while the Employer does not provide the freelancers with specialized equipment or materials (other than the storyboard paper given to the storyboard artists), little equipment is required by the freelancers to perform their duties. Fourth, many of the freelancers have had an on-going relationship with the Employer, as they have worked on prior series produced by the Employer. The record revealed that six of the nine storyboard artists have worked on previous series produced by the Employer; four of the five sluggers have worked on previous series; four of the nine sluggers have worked on previous series; and that the lone checker has worked on a previous series. Given that each series lasts between 30 to 40 weeks, the freelancers' length of employment is substantial. Fifth, the work performed by the freelancers is not just part of the Employer's

regular business, it is an essential component of the Employer's business. The record reveals that the work of storyboard artists, sluggers, sheet timers, and checkers is a regular and necessary part of producing an animated series.

The Employer's witnesses were unable to testify with certainty whether payroll deductions such as social security, state, and federal taxes were withheld from the freelancers' paychecks. The record is also silent regarding whether any of the freelancers were retained under a contract.

Weighing all the incidents of their relationship with the Employer, I find on balance, that the storyboard artists, sluggers, sheet timers, and checkers are employees within the meaning of the Act. Cf. *Roadway, supra* at 10-13.

### **III. The Community of Interest Issue**

The Employer alternatively asserts that, if the freelancers are found to be employees, then they do not share a community of interest with the in-house series employees.

In *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), the Board set forth the general factors to be evaluated in determining whether employees share a community of interest. The Board looked to see if the employees had differing methods of wages or compensation, hours of work, employment benefits, supervision, qualifications, training and skills, job functions, and working time spent away from the facility; as well as a lack of contact with other employees; lack of integration with the work functions of other employees; and the history of bargaining. *Id.* at 137. The determination of community of interest is not, however, a mechanical exercise in factors, but rather is a determination which must be tailored to the individual employer and industry.

In this case, several factors indicate that the freelancers lack a community of interest with the in-house series employees while several other factors indicate that the freelancers share a community of interest with the in-house series employees. The factors indicating a lack of community of interest are as follows. First, the in-house series employees are paid a weekly salary while the freelance employees are paid a flat rate per project. Second, the in-house series employees have set work hours, Monday through Friday from 9:00 a.m. to 6:00 p.m., while the freelance employees do not have set hours. Third, the in-house series employees receive health benefits, while the freelance employees do not. Fourth, since the freelance employees work at home, they do not work alongside the in-house series employees. Fifth, the Employer has never employed storyboard artists, sluggers, sheet timers, or checkers as in-house employees.

The factors showing that the freelance employees do share a community of interest with the in-house series employees are as follows. First, the freelance and in-house series employees have the same types of training and skills. The in-house series employees obviously require artistic skills in order to design all of the elements of the characters, props, and backgrounds. The storyboard artists require similar artistic skills to take the various models provided to them and to use them visually represent the plot and action on the storyboards. As for the sluggers, sheet timers, and checkers, the record shows that all of the persons working in these positions need to be experienced in animation, and are in fact experienced in animation, in order to be able to do their jobs. The similarity of skills utilized by the employees can be a key factor in making community of interest determinations. See *William N. Taylor, Inc.*, 288 NLRB 1049, 1072 (1988).

Second, the skills required by the freelance and in-house series employees to perform their work are of a specialized nature and are of a high level. This also can be a significant factor in community of interest determinations. See *Scolari's*

*Warehouse Markets*, 319 NLRB 153, 157 (1995). Third, there is overlapping supervision. For example, the storyboard artists work closely with the storyboard supervisors, as do the in-house positions of character designer, prop designer, and background designer. The immediate supervisor of the character designers, background designers, and background painters is the director; the sluggers, sheet timers, and checkers also report to the director. Common supervision is another important factor in evaluating community of interest. See *Ray's Sentry*, 319 NLRB 724, 725 (1995). Fourth, while the freelancers do not perform their work at the facility, such is not unusual in the animation industry. The record reveals that even storyboard artists, sluggers, sheet timers, and checkers who work in-house for other studios sometimes perform work outside of the facility. Fifth, the freelance employees perform a role in pre-production which is a necessary component for preparing for animation. Sixth, the record shows that, in the animation industry, the storyboard artists, sluggers, sheet timers, and checkers are typically included in the unit.

The record is silent as to the interaction between freelance and in-house series employees as well as to the interaction amongst the freelancers.

Based on the foregoing analysis, I find that the freelance storyboard artists, sluggers, sheet timers, and checkers share a community of interest with the other employees and are therefore eligible to vote.

#### **IV. The Canadian Citizen Issue**

At the hearing, the Petitioner took the position that the freelancers who were Canadian citizens residing in and working from Canada should be excluded from the unit solely on the basis of their nationality and residence. At the hearing, the Employer disagreed. In its post-hearing brief, however, the Employer changed its position to agree with the Petitioner that these persons should be excluded from

the unit due to their nationality and residence. The Act does not apply outside of the United States unless the United States has obtained sovereignty or some measure of legislative control in the foreign location. *Range Systems Engineering Support*, 326 NLRB No. 85 (September 1998). This is so even where employees of a United States business do the same work in a foreign location that other employees do in the United States. *GTE Automatic Electric*, 226 NLRB 1222 (1976). Accordingly, I find that the freelance employees who are Canadian citizens living and working in Canada are to be excluded from the unit.

There are approximately 60 employees in the unit found appropriate.

- 5/ The parties agreed that the eligibility formula established in *DIC Entertainment, LP*, 328 NLRB No. 86 (May 28, 1999), would be applicable herein.

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